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No. 71-242

In the Supreme Court of the United States

OCTOBER TERM, 1971

HAROLD P. ROGERS, ET AL., PETITIONERS

v.

MELVIN R. LAIRD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a2) is not yet reported. The opinion of the district court (Pet. App. a3-a14) is reported at 319 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1971. The petition for a writ of certiorari was filed on August 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the lower courts erred in their factual determination that petitioners had failed to show that they were being paid at rates below the "prevailing rates" referred to in 5 U.S.C. 5341.

2. Whether the Secretary's determination to utilize a percentage differential system for computing the wages of Navy blue-collar supervisors was arbitrary or capricious.

STATUTE INVOLVED

5 U.S.C. 5341 provides in pertinent part:

> (a) The pay of employees excepted from chapter 51 of this title by section 5102(c)(7) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. * * *

STATEMENT

Petitioners are blue-collar supervisors employed at the Norfolk Naval Shipyard who brought this action contending that the use by the Secretary of the Navy of a "percentage differential" system in calculating their wages resulted in their receiving wages below the "prevailing rates" contemplated by 5 U.S.C. 5341 (Pet. App. a3–a4). The district court found that petitioners had failed to show that they were in fact receiving wages below prevailing rates, and upheld the percentage differential system as a reasonable exercise of the Secretary's discretion under the statute (Pet. App. a3–a14). The court of appeals affirmed *per curiam* on the district court's opinion (Pet. App. a1–a2).

1. The evidence before the district court showed that, in order to determine the prevailing rates on which blue collar wages are based, the Secretary regularly conducts wage surveys in each area where Navy personnel are employed.[1] Wage data are collected in each area from representative area companies that have similar jobs and working conditions to those of the Navy (Pet. App. a5). In the Norfolk area, the Navy has obtained wage data from more than 30 companies, including five private shipyards (Exhibit 61; Tr. 75, 80).[2] The wage survey information is the basis for wages paid at all the Naval activities in the Norfolk area (Pet. App. a5).

While the wages of blue-collar journeymen are based on a direct comparison with locally prevailing rates, the Navy has long computed the salaries of its blue-collar supervisors by using a differential system whereby the supervisor's pay is related to that of the worker he supervises (Sup. App. a23; Tr. 163). That differential may be expressed as either a flat "cents-per-hour" above the journeyman wage, or in a more flexible manner as a percentage of that wage. The differential method of computing blue-collar supervisory wages is the "prevalent system" used in private industry (Sup. App. a23; see Pet. App. a6).

[1] Full scale wage-surveys are conducted every three years. In the intervening years, a wage change survey is conducted, which considers only the changes in wages since the preceding year. Salaries are reviewed annually, and for the past twenty-five years, blue-collar salaries have regularly increased as a result of the surveys. (Pet. App. a5).

[2] References to the record before the court of appeals are to the Appendix (App.), Supplementary Appendix (Sup. App.), the Transcript (Tr.), or exhibits by number.

The Navy's use of a differential method in paying its blue-collar supervisors was not based solely upon the wide use of this system in private industry, but turned also on several other considerations. These included: (1) the fact that the government typically has a greater number of levels of supervision than does private industry, so that direct comparisons are difficult if not impossible at the supervisory level (Pet. App. a5; Sup. App. a15); (2) the fact that while comparable positions may exist in some areas, they do not exist in all, and a direct comparison method for supervisory salaries would therefore not produce a consistent and rational pay system (App. a85, a90); and (3) the fact that while mechanics' wages are available, private employers have consistently refused to make supervisory salary schedules available to the government (Pet. App. a6).

In 1952, following an exhaustive analysis of its own and private industry's supervisory pay practices, the Navy replaced its long-standing fixed cents per hour differential with a percentage differential (Pet. App. a4). The differential was set at 25 percent for the first level of supervision; higher supervisory levels received higher percentages. To establish that percentage, the Navy studied its past practices under the flat rate differential, which revealed that on a percentage basis, the supervisory differential had averaged between twenty and thirty percent (Sup. App. a24–a27). The Navy also conducted a study of private industry rates and found them in the same range (App. a99).

Subsequently, the differentials were restudied over the years, and compared to private industry rates (Sup. App. a15). For example, in 1964, the Navy conducted a survey of supervisory pay involving both initial and senior supervisory positions (Sup. App. a28–a33). This study revealed that the mean percentage over journeyman mechanics in private industry was 24.8 percent and for senior supervisors the industry differential was 208 percent compared to the Navy's 215 percent (Sup. App. a32–a33).

Since 1968, the Civil Service Commission has had the responsibility for establishing blue-collar wages for all government employees under 5 U.S.C. 5341. The Civil Service Commission has adopted a percentage differential system for paying all government blue-collar supervisors (Pet. App. a6–a7).

ARGUMENT

1. The lower courts correctly concluded that the percentage differential system, used by the Navy since 1952 and adopted throughout the government in 1968, is reasonable under 5 U.S.C. 5341. The decision to use a percentage differential was reached after extensive administrative scrutiny of the Navy's past practices and those of private industry, where this system is "widely used" (Pet. App. a6). In addition, the evidence revealed that substantial differences exist between the Navy and private industry in their organization, that comparable supervisory pay rates were largely unavailable, and that the percentage differential resulted in wages approximating prevailing rates in the area.

Congress' long acquiescence in the Navy's use of this differential also indicates its compatability with the statutory plan. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473. Moreover, the decision below conflicts with no other lower court decision. The Navy's use of a percentage differential under virtually identical statutory language[5] was upheld in *Daniels* v. *United States*, 407 F. 2d 1345 (Ct. Cl.).

2. Petitioners argue (Pet. 9) that the district court erred in rejecting their contention that the pay of Navy supervisors in Norfolk was not in keeping with that of supervisors at a local shipyard (Pet. App. a10). The district court's decision on this question of fact—concurred in by the court of appeals—was correct and further review is unwarranted.

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[5] 5 U.S.C. 5342 provides that compensation for ships' pilots be fixed "as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry."

[6] The charts appended to the district court opinion (Pet. App. a13, a14) show that there is little correlation between the responsibilities of Navy supervisors and those at the private shipyard in Norfolk. Even assuming the responsibilities were similar, the wage data introduced (App. a16, a18, a38) revealed that at the first two supervisory levels, the mean difference between the Navy rate of pay and that at the private shipyard was $.19 per hour. The higher private rates were in part the result of the fact that the private salaries are earned after the supervisor has worked for a longer period of time, *e.g.*, one year rather than six months, or five years instead of two years.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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